Supreme Court, U.S.
FILED

No. 001628 APR 24 2001

OFFICE OF THE CLERK

In The

Supreme Court of the United States

STATE OF NEBRASKA, ex rel. DON STENBERG,
Attorney General of the State of Nebraska,

Petitioner,

CITY OF GRAND ISLAND,

Plaintiff,

v.

UNITED STATES OF AMERICA; ENVIRONMENTAL PROTECTION AGENCY; CAROL M. BROWNER,
Administrator of the United States
Environmental Protection Agency,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Submitted by:

DON STENBERG, #14023
Attorney General
Counsel of Record

L. STEVEN GRASZ, #19050
Deputy Attorney General
2115 State Capitol
Lincoln, NE 68509-8920
Tel: (402) 471-2682

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

24pp

QUESTION PRESENTED FOR REVIEW

I. Whether Congress has prohibited a state from challenging the constitutionality of the Safe Drinking Water Act in United States District Court?

LIST OF PARTIES

The Petitioner is the State of Nebraska, ex rel., Don Stenberg, Attorney General for the State of Nebraska. The Respondents are the United States of America, the United States Environmental Protection Agency and Carol M. Browner, Administrator of the United States Environmental Protection Agency.

An additional plaintiff in the United States District Court for the district of Nebraska was the City of Grand Island, Nebraska.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES

State of Nebraska, et al. v. United States of America, et al., 238 F.3d 946 (8th Cir. 2001) 1

Missouri v. United States, 109 F.3d 440 (8th Cir. 1997) 7

Virginia v. United States, 74 F.3d 517 (4th Cir. 1996) ...7, 8

STATUTES

28 U.S.C. § 1251 (1993) 2, 5

28 U.S.C. § 1254(1) (1993) 1

28 U.S.C. § 1291 (1993) 4

28 U.S.C. § 1331 (1993) 2, 4, 6, 8

28 U.S.C. § 2201 (1994) 4

42 U.S.C. § 300f-300j (2000) 3

42 U.S.C. § 300j-7 (2000 Supp.).....2, 4, 6, 7

42 U.S.C. § 7607 (1995) 7

CONSTITUTIONAL PROVISIONS

U.S. Const., Art. III, Sec. 2, cl. 2.....2, 5

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 238 F.3d 946 (8th Cir. 2001) (App. 1-7). The opinion of the United States District Court for the District of Nebraska is not reported. (App. 8-10).

JURISDICTION

On February 1, 2001, the United States Court of Appeals for the Eighth Circuit entered its opinion and judgment. The jurisdiction of this Court to review the judgment in question is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. A petition for review of –

> (1) actions pertaining to the establishment of national primary drinking water regulations (including maximum contaminant level goals) may be filed only in the United States Court of Appeals for the District of Columbia circuit; and
>
> (2) any other action of the Administrator under this chapter may be filed in the circuit in which the petitioner resides or transacts business which is directly affected by the action.

Any such petition shall be filed within the 45-day period beginning on the date of the promulgation of the regulation or any other final Agency action with respect

to which review is sought or on the date of the determination with respect to which review is sought. . . .

42 U.S.C. § 300j-7 (2000 Supp.).

2. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such regulations as the Congress shall make.

U.S. Const., Art. III, Sec. 2, cl. 2.

3. (b) The Supreme Court shall have original but not exclusive jurisdiction of:

> (1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;
>
> (2) All controversies between the United States and a State;
>
> (3) All actions or proceedings by a State against the citizens of another State or against aliens.

28 U.S.C. § 1251(b) (1993).

4. The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1331 (1993).

STATEMENT OF THE CASE

In 1974, Congress enacted the Safe Drinking Water Act at 42 U.S.C. § 300f-300j (2000). With a few minor exceptions, every public water system in each state must comply with the provisions of the Act or risk an enforcement action and civil penalties. The State of Nebraska owns and operates various public water systems including a system which provides water for the Lincoln Regional Center, a state institution under the supervision of the Nebraska Department of Health and Human Services and located in Lincoln, Nebraska. This public water system involves only ground water, is located wholly within state boundaries and does not involve any aspect of interstate commerce.

On September 14, 1999, the State of Nebraska (hereinafter Nebraska) and the City of Grand Island, Nebraska (hereinafter Grand Island), which also owns and operates a public water system, filed suit in district court against the respondents seeking a declaration that the Safe Drinking Water Act is unconstitutional as applied to certain local water supply systems owned by Nebraska and Grand Island. Nebraska and Grand Island alleged that the Act exceeds the authority of Congress as it purports to govern local public water systems located wholly within state boundaries which do not involve any aspect of interstate commerce, infringes upon the non-delegation doctrine as Congress has improperly delegated its legislative authority to the Environmental Protection Agency, and provides insufficient legislative standards for the guidance of the Environmental Protection Agency in designating the contaminants subject to regulation. Nebraska and Grand Island then requested a declaratory

judgment pursuant to 28 U.S.C. § 2201, finding and determining that the provisions of the Safe Drinking Water Act as applied are unconstitutional.

The Respondents, United States of America, Environmental Protection Agency and Carol M. Browner, Administrator, filed a Motion to Dismiss asserting, among other grounds, that subject matter jurisdiction was lacking because exclusive jurisdiction is vested in the United States Court of Appeals for the District of Columbia Circuit or other circuits. On April 4, 2000, the United States District Court for the District of Nebraska, Judge Kopf presiding, granted Respondents' Motion to Dismiss on the basis of 42 U.S.C. § 300j-7 (2000 Supp.), finding that exclusive jurisdiction was vested in the United States Court of Appeals.

The Complaint contained absolutely no allegations with regard to agency regulations or final agency action. Rather, the district court was asked to review the actions and authority of Congress itself in enacting the Safe Drinking Water Act and to find that the Act itself is unconstitutional and unenforceable. Notwithstanding the language of the Complaint and Nebraska's position that the district court had jurisdiction over the matter pursuant to 28 U.S.C. § 1331, the district court dismissed the Complaint for lack of subject matter jurisdiction, stating that Nebraska could not challenge only the constitutionality of the statutory scheme. (App. 10).

An appeal was taken to the Eighth Circuit Court of Appeals pursuant to 28 U.S.C. § 1291, and on February 1,

2001, that Court affirmed the judgment of the district court. (App. 1-7).

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari in this case to resolve an important question of federal law that has not been, but should be, settled by this Court. The ability of a state to access the federal courts to resolve a dispute with the government of the United States over an issue of federal constitutional law is one of the most important issues that can be placed before the Supreme Court of the United States.

In fact, Art. III, Section 2 of the United States Constitution provides for original jurisdiction in the United States Supreme Court for only two categories of cases: (1) "all Cases affecting Ambassadors, other public Ministers and Consuls;" and (2) "those in which a State shall be Party." It is also significant that Congress, in 28 U.S.C. § 1251, has provided for original jurisdiction in the United States Supreme Court for only very limited types of cases, one of which is "[A]ll controversies between the United States and a State . . . " 28 U.S.C. § 1251(b)(2). In this action Nebraska seeks to have the Safe Drinking Water Act declared unconstitutional because it exceeds Congress' power under the Commerce Clause and violates the non-delegation doctrine and the Tenth Amendment. However, while it is clear that Nebraska could bring its constitutional complaint against the United States as an original action, the Eighth Circuit Court of Appeals has denied Nebraska the opportunity to bring its

complaint in the United States District Court for the District of Nebraska.

In 28 U.S.C. § 1331, Congress has given all district courts original jurisdiction of all civil actions "arising under the Constitution, laws, or treaties of the United States." The ability to litigate a constitutional claim concerning an act of Congress in the United States District Court pursuant to 28 U.S.C. § 1331 should only be denied where Congress has expressly and unequivocally removed district court jurisdiction as to that specific act of Congress. That was not done here.

With regard to the Safe Drinking Water Act, Congress has removed district court jurisdiction of only two specific types of questions: (1) "actions pertaining to the establishment of primary drinking water regulations . . . " 42 U.S.C. § 300j-7(1); and (2) "any other action of the Administrator under this Chapter . . . " 42 U.S.C. § 300j-7(2). Nebraska does not raise either of these types of questions in its Complaint. Instead, Nebraska objects to Congress' actions and lack of authority in enacting this legislation so as to apply federal requirements to the Lincoln Regional Center and other local public water systems.

If the only way Nebraska can directly challenge the constitutionality of the Safe Drinking Water Act is an original action in the Supreme Court of the United States, then we are prepared to do so. However, that does not appear to us to be the intention of Congress. Congress clearly gave the United States District Court the jurisdiction to hear Nebraska's constitutional claim in 28 U.S.C. § 1331 and has not expressly and unequivocally withdrawn district court jurisdiction in 42 U.S.C. § 300j-7.

The Eighth Circuit is the only circuit court to have ruled that a district court lacks jurisdiction to consider the constitutionality of the Safe Drinking Water Act. In reaching its opinion the Eighth Circuit relied upon two decisions concerning a provision of the Clean Air Act, 42 U.S.C. § 7607(b)(1), which is substantially similar to 42 U.S.C. § 300j-7. (App. 5-7). One such decision was *Missouri v. United States*, 109 F.3d 440 (8th Cir. 1997). In Petitioner's view, the *Missouri* case may be distinguished as the State of Missouri specifically alleged that the EPA had taken final action in issuing several deficiency findings and, therefore, challenged certain actions of the EPA administrator under the Clean Air Act as well as part of the Act itself on constitutional grounds. It is the Petitioner's position that the Eighth Circuit has now gone beyond its ruling in *Missouri v. United States* in finding that § 300j-7 creates a jurisdictional bar to a district court's entertaining a constitutional challenge to a federal statute even before final agency action has occurred. Nebraska submits that § 300j-7 should not be allowed to restrict to the circuit courts a constitutional challenge of the Safe Drinking Water Act in circumstances where no final agency action has occurred.

Furthermore, we note that the Fourth Circuit has specifically held that the question which we present here is an unresolved question. The other case relied upon by the Eighth Circuit was *Virginia v. United States*, 74 F.3d 517 (4th Cir. 1996), in which the Fourth Circuit considered the jurisdictional provision of the Clean Air Act which channeled review of final EPA action exclusively to the Court of Appeals. One of Virginia's arguments was that the Court's construction of the jurisdictional provision of

the Clean Air Act forced the State to wait for hostile agency action in order to bring a constitutional challenge to the Clean Air Act. The Fourth Circuit noted that the situation described by Virginia was not presented in that case as Virginia filed suit after EPA took actions that were subject to challenge under the Clean Air Act. "We, therefore, have no occasion to consider whether, in the absence of those final actions, Virginia could have obtained review under the district court's general federal question jurisdiction." *Virginia* at 525. The set of circumstances anticipated by the Fourth Circuit in the *Virginia* case is present in this case. Nebraska challenges the constitutionality of an act of Congress, not any rule or administrative action of the EPA.

CONCLUSION

The important question of federal law that we ask this Court to resolve is whether Congress has prohibited a state from challenging the constitutionality of the Safe Drinking Water Act in United States District Court. The United States Court of Appeals for the Eighth Circuit held that despite 28 U.S.C. § 1331 the United States District Court lacked jurisdiction to consider this constitutional issue. We believe it was not the intention of Congress to restrict a challenge to the constitutionality of the Act in that manner. The Petitioner respectfully

requests the Court to grant its Petition for a Writ Of Certiorari.

Respectfully submitted,

STATE OF NEBRASKA, ex rel.,
DON STENBERG, Attorney
General for the State
of Nebraska, Petitioner

DON STENBERG, #14023
Attorney General
Counsel of Record

L. STEVEN GRASZ, #19050
Deputy Attorney General
2115 State Capitol
Lincoln, NE 68509-8920
Tel: (402) 471-2682

Counsel for Petitioner

United States Court of Appeals,
FOR THE EIGHTH CIRCUIT

No. 00-2410

State of Nebraska, ex rel. Don Stenberg, Attorney General of the State of Nebraska, Appellant, City of Grand Island, Plaintiff, v. United States of America; Environmental Protection Agency; Carol M. Browner, Administrator of the United States Environmental Protection Agency, Appellees.	)	Appeal from the United States District Court for the District of Nebraska.

Submitted: December 15, 2000
Filed: February 1, 2001

Before LOKEN and MAGILL, Circuit Judges, and BATTEY,[1] District Judge.

---

[1] THE HONORABLE RICHARD H. BATTEY, United States District Judge for the District of South Dakota, sitting by designation.

MAGILL, Circuit Judge.

The State of Nebraska and the City of Grand Island, Nebraska (together, "Nebraska"), filed suit in district court[2] against the United States, the Environmental Protection Agency (the "EPA"), and EPA Administrator Carol M. Browner, seeking a declaration that the Safe Drinking Water Act (the "Act"), 42 U.S.C. §§ 300f-300j (2000), is unconstitutional because it exceeds Congress's powers under the Commerce Clause and violates the nondelegation doctrine and the Tenth Amendment. The district court dismissed the suit for lack of subject matter jurisdiction, holding that 42 U.S.C. § 300j-7 requires suits "pertaining to the establishment of national primary drinking water regulations" to be filed within forty-five days of issuance of the regulations in the United States Court of Appeals for the D.C. Circuit. Nebraska appeals, and we affirm.

I.

The Safe Drinking Water Act requires the EPA to adopt regulations to prevent contamination of public water systems. 42 U.S.C. § 300g-1. The EPA drafts national primary drinking water regulations that establish the procedures necessary to treat contaminants that pose an adverse effect on human health. *Id.* at § 300f(1); *see also American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1269 (D.C. Cir. 1994). At issue in this case are the EPA's regulations for lead and copper (the "Lead and Copper Rule"), which became effective in December 1992. *See* 40

---

[2] The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska.

C.F.R. § 141.80-.91 (2000). The Lead and Copper Rule establishes a treatment technique that requires public water systems to monitor the levels of lead and copper at consumers' taps. If lead and copper levels are too high, the public water system must treat the water to reduce its corrosivity, thereby minimizing the lead and copper in the water. *Id.* at § 141.81-89.

A. *Nebraska I*

In July 1998, Nebraska filed suit in district court against the United States, the EPA, and EPA Administrator Carol M. Browner, seeking a declaration that the Act and the Lead and Copper Rule violated the Commerce Clause and the Tenth Amendment. On May 19, 1999, the district court granted Appellees' motion to dismiss, holding that under § 300j-7, the United States Court of Appeals for the D.C. Circuit has exclusive jurisdiction over Nebraska's claims.

B. *Nebraska II*

In September 1999, Nebraska, now joined by the City of Grand Island, again sought a declaratory judgment, this time alleging that the Act is unconstitutional as applied to two public water facilities in Nebraska, the Lincoln Regional Center and the City of Grand Island, because it exceeds Congress's powers under the Commerce Clause and violates the non-delegation doctrine and the Tenth Amendment. On April 4, 2000, the district court granted Appellees' motion to dismiss, holding that § 300j-7 requires suits "pertaining to the establishment of national primary drinking water regulations" to be filed

within forty-five days of issuance of the regulations in the D.C. Circuit. The court stated:

> Stripping the complaint of references to the EPA's implementing regulations does not change the result. A plaintiff bringing an 'as applied' challenge contends that the statute would be unconstitutional under the circumstances in which the plaintiff has acted or proposed to act. Because the [Act] is not self-implementing, Plaintiffs' 'as-applied' challenge necessarily implicates the EPA regulations or other final agency action. Plaintiffs cannot challenge only the constitutionality of the statutory scheme. (citations omitted).

Nebraska appeals the district court's April 4 decision.

II.

The district court's ruling is reviewed de novo. *Gilbert v. Monsanto Co.*, 216 F.3d 695, 699 (8th Cir. 2000). Nebraska argues that the district court erred in holding that § 300j-7 restricts jurisdiction over this case to the United States Court of Appeals for the D.C. Circuit. Section 300j-7 provides:

> A petition for review of –
>
> (1) actions pertaining to the establishment of national primary drinking water regulations (including maximum contaminant level goals) may be filed only in the United States Court of Appeals for the District of Columbia circuit; and

> (2) any other action of the Administrator under this chapter may be filed in the circuit in which the petitioner resides or transacts business which is directly affected by the action.
>
> Any such petition shall be filed within the 45-day period beginning on the date of the promulgation of the regulation or any other final Agency action with respect to which review is sought or on the date of the determination with respect to which review is sought.

Nebraska claims that it is only attacking the Act and is not attacking a "final Agency action" under § 300j-7. Therefore, Nebraska argues, it should be able to proceed in a Nebraska federal district court under general federal question jurisdiction.

In holding that it was without jurisdiction to hear Nebraska's claim, the district court relied on *Virginia v. United States*, 74 F.3d 517 (4th Cir. 1996), and *Missouri v. United States*, 109 F.3d 440 (8th Cir. 1997). In *Virginia*, the Fourth Circuit held that the Clean Air Act precluded the district court from exercising jurisdiction over a complaint filed by Virginia that challenged the constitutionality of various provisions of the Clean Air Act. The Clean Air Act's judicial review provision provides that a petition for review of any "final action of the [EPA] Administrator . . . may be filed only in the United States Court of Appeals for the appropriate circuit." 42 U.S.C. § 7607(b)(1). Despite this provision, Virginia sought to proceed in district court under general federal question jurisdiction, arguing that its action was directed at the Clean Air Act itself rather than any final EPA action. *See*

Virginia, 74 F.3d at 522. The Fourth Circuit rejected Virginia's attempt to cast its complaint as being directed solely against the constitutionality of the Clean Air Act and not against the Act's implementing regulations, stating that "although [Virginia] seeks a ruling that certain parts of the [Clean Air Act] are unconstitutional, the practical objective of the complaint is to nullify final actions of [the] EPA." *Id.* at 523. Thus, the court's holding prevented Virginia from evading the Act's requirement that challenges to "final Agency action" be brought directly to a federal court of appeals.

Similarly, in *Missouri*, the state of Missouri brought suit in district court, arguing that the Clean Air Act and certain actions of the EPA Administrator interpreting the Clean Air Act were unconstitutional. 109 F.3d at 441. This Court, following the Fourth Circuit's decision in *Virginia*, rejected Missouri's reasoning that it could proceed in district court because it sought to challenge the constitutionality of the Clean Air Act and not just the actions of the EPA. *See id.* at 442. We instead ruled that Missouri's challenge to the Clean Air Act could not be completely separated from the EPA's actions, thereby preventing Missouri from evading the Clean Air Act's jurisdictional requirement that lawsuits challenging "final Agency action" be brought directly to the court of appeals. *See id.*

As in *Virginia* and *Missouri*, Nebraska's suit challenging the constitutionality of the Act is not independent of the EPA's implementing regulations. In *Nebraska I*, Nebraska challenged the Lead and Copper Rule. After the district court dismissed *Nebraska I* for lack of jurisdiction, Nebraska filed suit again, only this time omitting references to the EPA's implementing regulations and

instead casting its complaint as an "as-applied" challenge to the Act itself. However, the Act is not self-executing; rather, it is applied through EPA regulations. *See* 42 U.S.C. § 300g-1(b)(1)(A) (requiring the EPA to promulgate national public drinking water regulations). Therefore, Nebraska's challenge to the Act as applied to the public water facilities at the Lincoln Regional Center and the City of Grand Island necessarily implicates the EPA's regulations.

III.

We AFFIRM the district court's dismissal of Nebraska's suit because § 300j-7 required Nebraska to bring its suit in the United States Court of Appeals for the D.C. Circuit.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

STATE OF NEBRASKA, ex rel. Don Stenberg, Attorney General of the State of Nebraska, and CITY OF GRAND ISLAND, NEBRASKA,	4:99CV3252
Plaintiffs,	**MEMORANDUM**
vs.	**AND ORDER**
UNITED STATES OF AMERICA, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency,	(Filed April 4, 2000)
Defendants.	

This matter is before the court on Defendants' motion to dismiss (filing 15), filed pursuant to Fed. R. Civ. P. 12(b)(1). Defendants argue that subject matter jurisdiction is lacking because: (1) under provisions of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300j-7, exclusive jurisdiction is vested in the United States Court of Appeals for the District of Columbia Circuit (with respect to "actions pertaining to the establishment of national primary drinking water regulations") or other circuits (with respect to "any other final action of the [EPA] Administrator"); (2) Defendants' sovereign immunity has not been waived; (3) Plaintiffs lack standing; and (4)

Plaintiffs' claims are not ripe for review. I shall grant Defendants' motion on the basis of SDWA § 300j-7.

Plaintiffs, the State of Nebraska and the City of Grand Island, Nebraska, seek a declaratory judgment that the provisions of the SDWA, as applied to regulate the water supply systems at the Lincoln Regional Center (a State-owned facility) and within the City, are unconstitutional because they exceed the authority granted to Congress by the Commerce Clause, violate the Tenth Amendment, and improperly delegate legislative authority to the Environmental Protection Agency. Plaintiffs purport to challenge only the Act itself, and not any EPA regulations or actions.

In a related case that was filed in this court on July 6, 1998, *State ex rel. Stenberg v. United States Environmental Protection Agency, et al.*, Case No. 4:98CV3226, the State sought a declaratory judgment that the SDWA, and the regulations that were promulgated by the EPA to implement the Act, violated the Commerce Clause and Tenth Amendment. That action was ordered dismissed for lack of jurisdiction on May 19, 1999.

Stripping the complaint of references to the EPA's implementing regulations does not change the result. A plaintiff bringing an "as-applied" challenge contends that the statute would be unconstitutional under the circumstances in which the plaintiff has acted or proposed to act. *See Olmer v. City of Lincoln*, 23 F.Supp.2d 1091, 1104 (D.Neb. 1998), *aff'd*, 192 F.3d 1176 (8th Cir. 1999). Because the SDWA is not self-implementing, Plaintiffs' "as-

applied" challenge necessarily implicates the EPA regulations or other final agency action. Plaintiffs cannot challenge only the constitutionality of the statutory scheme. *See Missouri v. United States*, 109 F.3d 440, 441-42 (8th Cir. 1997); *Virginia v. United States*, 74 F.3d 517 (4th Cir. 1996).

IT IS ORDERED that Defendants' motion to dismiss (filing 15) is granted and Plaintiffs' complaint is dismissed for lack of subject matter jurisdiction.

DATED this 4th day of April, 2000.

BY THE COURT,

/s/ Richard G. Kopf
Richard G. Kopf
Chief United States District Judge